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RECENT DECISIONS.

Edward W. Walker, *Editor-in-Charge.*

APPEAL AND ERROR—TITLE ACQUIRED ON FAITH OF DECREE LATER REVERSED.—The appellants, during the pendency of a writ of error, purchased land as unencumbered, relying upon a decree of the court which was later reversed. *Held,* the writ of error, in the absence of consent of the Supreme Court and the filing of a bond, did not act as a *supersedeas* and the appellants acquired an absolute title. *C. & N. W. Ry. Co.* v. *Garrett et al* (Ill. 1909) 87 N. E. 1009.

Where third parties purchase property at a judicial sale under a judgment later reversed, they acquire absolute title because of the policy of encouraging bidding at such sale. 9 COLUMBIA LAW REVIEW 163. Where, however, they buy from a party to the suit, in whose favor the judgment exists, their rights are determined by subsequent circumstances. If a writ of error is later sued out, they are not *pendente lite* purchasers, *Macklin* v. *Allenberg* (1889) 100 Mo. 337, as the writ is the beginning of a new suit, and the judgment of the lower court is absolute until reversed. *Ry. Co.* v. *Twombly* (1879) 100 U. S. 78. But in the case of an appeal, which is not a new action, *Brockway* v. *Jewett* (N. Y. 1853) 16 Barb. 590, but merely a continuation of the former one, suspending all orders thereunder, *Yeaton* v. *U. S.*. (1809) 5 Cranch 281; *Yocom* v. *Moore* (Ky. 1815) 4 Bibb. 221, the parties' rights are subject to the final outcome, *Dunnington* v. *Elston* (1884) 101 Ind. 373; *Smith* v. *Burns* (1895) 72 Miss. 966. The same result has been reached when a bill of review has been later filed, *Clarey* v. *Marshall's Heirs* (Ky. 1836) 4 Dana 96, or a writ of error, where its nature is that of an appeal. *Harle* v. *Langdon's Heirs* (1883) 60 Tex. 555. Statutes have made the filing of a bond a condition precedent to a perfecting of an appeal, *Parker* v. *Courtnay* (1890) 28 Neb. 605, or, as in the principal case, a writ of error, *Lancaster* v. *Snow* (1900) 184 Ill. 163, and under them even the pendency of the appeal or writ of error is immaterial unless the conditions are complied with.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE.—The Attorney General in behalf of the United States sought to restrain alleged violations by the defendants of the "Commodities Clause" enactment. *Held,* (1) the act did not apply to carriers which had only a stock interest in the coal-producing companies; (2) carriers which produced or owned coal must disassociate themselves from ownership before transportation. *U. S. ex rel Att'y Gen'l* v. *Delaware & Hudson Co.* (1909) U. S. Sup. Ct. Opinion filed May 3. See Notes, p. 534.

COPYRIGHT—RIGHT OF DRAMATIZATION—INFRINGEMENT BY MOVING PICTURES.—The plaintiffs possessed the sole right of dramatizing a novel. The defendants, without their permission, had parts of the story performed in private without dialogue, and later publicly exhibited moving pictures of this performance. *Held,* the right of dramatization was infringed. *Harper Bros.* v. *The Kalem Co.* (U. S. C. C. A. 1909) 41 N. Y. L. J. No. 14.

The performance photographed in the principal case, being substantially similar to the original composition, would have violated the plaintiffs' right of dramatization had it been public, since dialogue is not essential. *Daly* v. *Palmer* (U. S. C. C. 1868) 6 Blatch. 256; *Daly* v. *Webster* (1892) 56 Fed. 483. While it has been denied that a photograph may display sufficient originality to be copyrighted, on the ground that it is merely a light-written image, note 17 Fed. 576; cf. *Wood* v. *Abbott* (U. S. C. C. 1866) 5 Blatch. 325, the opposite view is generally accepted, because of the originality which may be exercised anterior to the taking, in the choice of

subject and in the arrangement of light and shade effects etc. *Litho Co.* v. *Sarony* (1884) 111 U. S. 53; *Falk* v. *Donaldson* (1893) 57 Fed. 32; *Bolles* v. *The Outing Co.* (1897) 77 Fed. 966. When, however, a copyrighted production, as a piece of sculpture, has been photographed, the same artistic conception is reproduced and an infringement occurs, although the methods of artistic expression are dissimilar. *Bracken* v. *Rosenthal* (1907) 151 Fed. 136; cf. *Falk* v. *Howell* (1888) 37 Fed. 202. It has been intimated that an infringement also results upon a public rendition of copyrighted music by instruments using perforated music rolls. *White-Smith Co.* v. *Apollo Co.* (1907) 209 U. S. 1, 16. This reasoning would appear to apply to the principal case since the effect conveyed by moving pictures is practically the same as that produced by presentation without dialogue, *Daly* v. *Palmer, supra,* and their exhibition gives the element of publicity essential to an infringement under § 4996 U. S. R. S. Cf. § 1 (d) of the Copyright Law in force July 1st, 1909.

CORPORATIONS—DIRECTOR'S PERSONAL LIABILITY—FAILURE TO FILE REPORT.—Montana Civ. Code 1895, § 451 provided that in the event of failure to file an annual report, the directors shall be personally liable for all debts of the corporation "then existing." *Held,* a debt arose at the inception of a contract for the future delivery of goods, and not upon delivery. *Risdon Iron & Locomotive Works* v. *Von Storch* (Mont. 1909) 166 Fed. Rep. 936.

In New York, the state from which the statute is adopted, a right of action against the corporate trustee or director arises when three elements concur; i. e., the existence of the trusteeship, of the default, and of the corporate debt. *Shaler & Hall Quarry Co.* v. *Bliss* (1863) 27 N. Y. 297. Having once attached, the liability remains fixed. *Boughton* v. *Otis* (1860) 21 N. Y. 261. The statute, although in its effects remedial in respect to creditors, *Jones* v. *Barlow* (1875) 62 N. Y. 202, is conceived to be primarily penal. *Gold* v. *Clyne* (1892) 134 N. Y. 262; *Gregory* v. *Germania Bank* (1877) 3 Colo. 332. (statute identical with the New York Act). On the doctrine of strict interpretation of a penal statute, the theory that the debt only arises upon delivery, *Garrison* v. *Howe* (1858) 17 N. Y. 458; *Gold* v. *Clyne, supra,* may be explained. Assume, however, that director A, already in default, contracts to buy goods, defaults again, and is succeeded by director B, to whom delivery is made, and who later files a report as required. In such a case, under the New York theory, the creditor is without a remedy against either director personally, because the debt does not arise when A is in office, and B is not in default. Such a result is contrary to the remedial conception of the statute, and is obviated by the principal case. Assume, moreover, that in a similar case, B fails to file at the specified date. He would then be liable. This result, it is submitted, is open to the criticism that B should not be held for goods which he did not order. The principal case, therefore, in adopting the less technical definition of the word "debt", would seem more fully to meet the legislative intent.

CORPORATIONS—FIDUCIARY RELATION OF THE MAJORITY STOCKHOLDER.—The defendant, owning a controlling interest in a mining corporation and dominating its affairs, through this relation obtained knowledge that the acquisition of an adjoining claim would greatly increase the value of the corporation's property, and purchased it for himself. *Held,* in the suit by a minority stockholder to have defendant declared a trustee for the corporation, that although he occupied a fiduciary relation like an officer or director his action was not a breach of that relation. *Zeckendorf* v. *Steinfeld* (Ariz. 1909) 100 Pac. 784.

Directors are in a fiduciary relation because they are agents. *Pearson* v. *Concord R. R. Co.* (1883) 62 N. H. 537. Accordingly, their contracts with the corporation are voidable, *Duncomb* v. *N. Y. H. & N. R. R.* (1881) 84 N. Y. 190, but such agreements, if not actually fraudulent, may be ratified by the corporation even though the contracting director controls the majority of votes cast, *Northwest Transp. Co.* v. *Beatty* (1887)

L. R. 12 A. C. 589, since the stockholder being neither an agent nor a trustee may vote for his own interest, *U. S. Steel Corp.* v. *Hodge* (1902) 64 N. J. Eq. 807, and his right to do so is not effected by the fact that he becomes a majority owner. *Windmuller* v. *Standard D. & D. Co.* (1902) 114 Fed. 491. These conclusions though logical have proved unfortunate in practice and are being modified. In contracting with the corporation a stockholder is held to a larger measure of faith than a non-stockholder, *Atwater* v. *American Exchange Nat'l Bank* (1894) 152 Ill. 605, and when he actually controls a corporation for his own benefit, to the prejudice of the minority, he enters into the trust relation, *Rothschild* v. *Memphis & C. R. R. Co.* (1902) 113 Fed. 476, for he then becomes an "actual" if not a "technical" trustee, and any act in his interest to the detriment of the minority is voidable. *Wheeler* v. *Abilene Bank Bldg. Co.* (1908) 159 Fed. 291. Though it is held *contra* to *Northwest Transp. Co.* v. *Beatty, supra,* that a controlling stockholder may not vote to ratify a contract made by him as a director, *Crichton* v. *Webb Press Co.* (1904) 113 La. 167, it seems, by the weight of authority, that when a majority stockholder practically contracts with himself such contract is *prima facie* valid, and voidable only if unfair, while a director's contract is *prima facie* voidable. In this respect, at least, the fiduciary relation of directors and majority stockholders is not co-extensive.

CORPORATIONS—LIBEL PER SE—IMPUTATION OF CRIME.—The plaintiff, a corporation, brought suit for libel, alleging that the defendant had published by letter that it had bribed one of their solicitors. *Held,* the action could not be maintained without an allegation of special damages. *Kimball & Mills of Pittsburg* v. *Kaign et al.* (1909) 115 N. Y. Supp. 810.

A corporation cannot sue in libel upon an imputation of corruption, because a corporation cannot be guilty of corruption. Pollock C. B. in the *Met. Saloon Omnibus Co.* v. *Hawkins* (1859) 4 H. & N. 87. But conceptions of corporate capacity for crimes have greatly broadened, 9 COLUMBIA LAW REVIEW 78; *People* v. *Rochester Ry. & Light Co.* (N. Y. 1909) 41 N. Y. L. J. No. 6, and there is much reason in the contention of the dissenting opinion that the words in question imputed a crime of which the corporation might be guilty. But granting this, it does not follow that the words were libelous *per se.* When written of an individual words imputing a crime are libelous *per se* because they of necessity damage his personal character, an attribute that a corporation does not possess, except in a business way. *South Hetton Coal Co.* v. *North-Eastern News Ass'n* L. R. (1894) 1 Q. B. 133. Accordingly, words are actionable without proof of special damage when they are such as would inevitably injure the plaintiff's business, *St. James Military Academy* v. *Gaiser* (1894) 125 Mo. 517; *Bee Pub. Co.* v. *World Pub. Co.* (1900) 59 Neb. 13, e. g. by affecting the credit of a corporation which requires credit, *Arrow Steamship Co.* v. *Bennett* (N. Y. 1893) 73 Hun 81, or deterring customers from dealing with it by charging incapacity or neglect in business. *Ohio & M. Ry. Co.* v. *Press Pub. Co.* (1891) 48 Fed. 206. A charge that a corporation uses unfair means to secure business does not, however, come within the rule. *American Book Co.* v. *Gates* (1891) 48 Fed. 206. In the principal case, the majority thought that pecuniary damage would not necessarily result, a question upon which there may well be a difference of opinion. Upon this ground it is distinguishable from *Town Topics Pub. Co.* v. *Collier* (N. Y. 1906) 114 App. Div. 191, where an allegation that a publishing corporation was guilty of blackmail was held libelous *per se.*

DEEDS—ACCEPTANCE UNDER CONTRACT TO CONVEY—IMPLIED COVENANT OF TITLE.—The defendant gave a quit-claim deed in performance of a contract to convey land. Title proving defective, the plaintiff sued on the contract. *Held,* the defendant's contract obligation to give good title survived the acceptance of the deed. *Davis* v. *Lee* (Wash. 1909) 100 Pac. 752.

In executory contracts for the sale of realty, there is an implied condition, giving the vendee the right to demand a good title. *Johnson* v.

Johnson (1802) 3 B. & P. 162. Since this implied condition is of no effect when the contract is executed by the acceptance of the deed, the vendee is then without remedy for a defective title in the absence of fraud, or express covenants. *Burwell* v. *Jackson* (1854) 9 N. Y. 535. In England, at an early date, the vendee, in taking a deed under a contract to convey, was entitled to insist on an express covenant of general warranty, although this was later limited to a special warranty. Rawle, Cov. for Title (3rd Ed.) 549. In this country, some states hold a general warranty necessary; *Tavenner* v. *Barrett* (1883) 21 W. Va. 656, 681; others insist merely on a special warranty; *Espy* v. *Anderson* (1850) 40 Pa. St. 308; while a third class requires the customary covenants as determined by the *lex rei sitae*. *Gault* v. *Van Zile* (1877) 37 Mich. 22. The states requiring a warranty of one form or another are in the majority, but a number of jurisdictions hold that no covenants are necessary, and that a quit-claim deed is sufficient. *Ketchum* v. *Sweet* (N. Y. 1816) 13 Johns. 359; *Kyte* v. *Kavanagh* (1869) 103 Mass. 356; *Lounsbery* v. *Locander* (1874) 25 N. J. Eq. 554. This would seem to be the logical view where a quit-claim deed is sufficient to convey the fee simple. *Bayley* v. *Fletcher* (1884) 44 Ark. 153. While, therefore, a vendee in taking a deed may in some jurisdictions require the vendor to give an express covenant for title, there is no authority for allowing a vendee who has accepted a deed without such requirement, to recover on an implied covenant for a defect in title.

DOMESTIC RELATIONS—DIVORCE—COLLATERAL ATTACK.—The plaintiff's assignor, whose husband had secured a decree of divorce, void because of non-residence of the parties, never attempted to have it set aside. *Held*, the plaintiff may secure the wife's distributive share of her husband's estate because of the nullity of the decree. *Sammons* v. *Pike* (Minn. 1909) 120 N. W. 540.

It is well settled that a divorce granted by a court without jurisdiction, being void, may be vacated, *Morton* v. *Morton* (1891) 16 Colo. 358, but see *O'Connell* v. *O'Connell* (1880) 10 Neb. 390, or collaterally attacked, *Israel* v. *Arthur* (1883) 7 Colo. 5, even if the prevailing party has remarried. *Everett* v. *Everett* (1884) 60 Wis. 200. But if the defendant in the divorce action has taken any advantage of the decree, as by remarriage, *Arthur* v. *Israel* (1890) 15 Colo. 147, which might bar him from denying its validity on principles similar to estoppel, see *Baily* v. *Baily* (1863) 44 Pa. St. 274, or if the delay in bringing suit leads to the inference that the defendant wished to take the benefit but avoid the losses resulting from the decree, *Zoellner* v. *Zoellner* (1881) 46 Mich. 511, he will not be allowed to set up the nullity of the decree. But see *In re Christiansen* (1898) 17 Utah 412. The theory advanced in the principal case that such decrees as are void for non-residence of both parties are an exception to this rule seems founded neither on reason nor precedent; see *Caswell* v. *Caswell* (1887) 120 Ill. 377, at 388; but since the evidence rebuts any inference that the wife acquiesced in the divorce, and the laches alone are not enough to overcome the jurisdictional defect, *Bulkley* v. *Bulkley* (N. Y. 1858) 6 Abb. Pr. 307, 312, the case is sustainable on its facts.

DOMESTIC RELATIONS—MARRIAGE VOIDABLE FOR FRAUD—DISEASE.—After marriage, the plaintiff discovered her husband was afflicted with a loathsome disease. Before final decree of annulment, she married again. *Held*, the latter marriage was void, since the former was voidable, but remained in effect until the entry of the final decree. *Jordan* v. *Mo. etc. Co.* (Mo 1909) 116 S .W. 432.

While a void marriage needs no decree to annul it, *Gattings* v. *Williams* (N. C. 1845) 5 Ired. L. 487, although one is frequently given on grounds of public policy, *Ferlat* v. *Gojon* (N. Y. 1825) 1 Hop. Ch. 478, a voidable marriage remains in effect until annulled by such a decree. *Bonham* v. *Badgley* (1845) 7 Ill. 622; *Elliott* v. *Gurr* (1812) 2 Phillim. 16. In England, there is no ground for regarding a marriage voidable for fraud, unless it is a question of identity of the parties. *Moss* v. *Moss* L. R. (1897) P.

D. 263. But in this country, fraud going to the essentials of the marriage relation is generally regarded as the test. *Smith* v. *Smith* (1898) 171 Mass. 404. Concealment of ante-nuptial pregnancy by another, therefore, is sufficient, *Reynolds* v. *Reynolds* (Mass. 1862) 3 Allen 605, although usually misrepresentations as to health are not. *Lyon* v. *Lyon* (1907) 230 Ill. 366; *Wendell* v. *Wendell* (N. Y. 1898) 30 App. Div. 447. Where, however, one party is afflicted with an incurable, loathsome disease, rendering marital intercourse highly dangerous to the health of the other, and this condition is not disclosed prior to marriage, a decree may be secured if consummation has not taken place. *Smith* v. *Smith, supra.* This is as far as some courts will go, *Vondal* v. *Vondal* (1900) 175 Mass. 383, although others appear to lay no stress upon the fact of consummation. *Crane* v. *Crane* (1901) 62 N. J. Eq. 21; *Meyer* v. *Meyer* (N. Y. 1875) 49 How. Pr. 311. One court at least has gone so far as to make no distinction between marriage and an ordinary contract in regard to fraud. *Di Lorenzo* v. *Di Lorenzo* (1903) 174 N. Y. 473. The principal case, therefore, in holding the first marriage voidable, is sound.

EASEMENTS—LOSS BY ABANDONMENT.—The defendants had an easement of way over the plaintiff's land to stables in the rear of their residences. One of the stables was sold, and the residences were replaced by apartment houses. The way had not been used for seven years. *Held,* the way was abandoned. *Norris* v. *Hoffman* (1909) 115 N. Y. Supp. 890.

Possession adverse to an easement, if of sufficient duration, may terminate it. *Maysville, etc. Co.* v. *Holton* (1897) 100 Ky. 665; *Jennison* v. *Walker* (Mass. 1858) 11 Gray 423. It is stated, also, that regardless of time, an easement may be lost by abandonment, provided the intention to abandon is unequivocally manifested. *Volger* v. *Geiss* (1879) 51 Md. 407; *Reg.* v. *Chorley* (1848) 64 E. C. L. R. 513. In applying this rule, however, the courts seem to insist that a change in position on the part of the servient tenant in consequence of the conduct of the dominant tenant is also necessary. *Smith* v. *Worn* (1892) 93 Cal. 206; *Cartwright* v. *Mapelsden* (1873) 53 N. Y. 622. Thus non-user, *Lovell* v. *Smith* (1857) 3 C. B. [N. S.] 119, a claim to the fee of the servient tenement, *Whites Bank etc.* v. *Nichols* (1876) 64 N. Y. 65, or the obstruction of the easement by the one possessing it, *Stokoe* v. *Singers* (1857) 8 Edl. & Bl. 31, are not in themselves sufficient. The better view, therefore, is that the doctrine of abandonment by acts *in pais* rests upon estoppel. *Scott* v. *Moore* (1900) 98 Va. 668. Although some courts do not apply this doctrine, and regard the mere manifestation of an intention to abandon as sufficient, *Jones* v. *Van Bachove* (1894) 103 Mich. 98, there should in theory be no objection to a resumption of the easement if no third parties are thereby prejudiced. *Whites Bank etc.* v. *Nichols, supra.* The reasoning of the principal case is not in accord with the weight of authority.

EQUITY—SPECIFIC PERFORMANCE—MUTUALITY—COMPLETE PERFORMANCE.—The defendant violated her engagement to perform exclusively in the plaintiff's theatre by engaging with the plaintiff's rival. *Held,* an injunction will issue to restrain her during the winter period of her contract, but not during the summer period, since the plaintiff was not then obliged to give her employment. *Keith* v. *Kellermann* (1908) 41 Chi. Legal News, No. 37. See Notes, p. 540.

FEDERAL PRACTICE—REMOVAL OF CAUSES—FEDERAL JURISDICTION.—A non-resident alien sued a corporation in the courts of a state other than that of the defendant's incorporation. The defendant obtained a removal to the federal court. *Held,* the cause was not removable without the plaintiff's consent. *Mahopoulus* v. *Chicago R. R. Co.* (1909) 167 Fed. 165. See Notes, p. 545.

LICENSES—REVOCABILITY—SPECIFIC PERFORMANCE OF CONTRACT.—The plaintiff and the defendant mutually agreed, orally, to construct a telephone

line over their respective lands. After it had been constructed and used for three years, the defendant cut the wires, and took down some of the poles. *Held,* the contract could not be specifically enforced, but amounted merely to a license revocable at will. *Yeager* v. *Tuning* (Oh. 1908) 41 Chic. Leg. News No. 36, 304.

At law, a parol license, executory or executed, by the weight of authority is revocable. 6 COLUMBIA LAW REVIEW 471. It is irrevocable, however, when it is connected with, and necessary to, the full enjoyment of an interest granted by the licensor in his land, *Powers* v. *Harlow* (1884) 53 Mich. 507; *Miller* v. *State* (1872) 39 Ind. 267, or of property in chattels on his land, title to which has been acquired from him. *Wood* v. *Manley* (1839) 11 Ad. & E. 34. In equity, a verbal agreement which is clear in its essential terms, showing an intention to transfer a right of a permanent and continuous nature, will be specifically enforced if there is such a part performance as would take it out of the statute of frauds. *Cook* v. *Prigdon* (1872) 45 Ga. 331; *Duke of Devonshire* v. *Eglin* (1851) 14 Beav. 530; *McManus* v. *Cook* L. R. (1887) 35 Ch. Div. 681. Where the facts show an intent to transfer a temporary right only, relief has been refused. *Wiseman* v. *Lucksinger* (1881) 84 N. Y. 31. The principal case in refusing to decree specific performance fails to make any distinction between cases in which the license arises out of contract, and those in which it does not, and erroneously regards the reasoning of the latter as controlling. *Nat'l Stockyards* v. *Wiggins Ferry Co.* (1885) 112 Ill. 384; *Lawrence* v. *Springer* (1892) 49 N. J. Eq. 289.

LIENS—LIVERY KEEPERS—RELINQUISHMENT OF POSSESSION TO OWNER.—The defendant had boarded a horse belonging to a third party, and had thereby acquired a statutory lien. The owner of the horse was accustomed to use the horse daily, and while thus in his possession he sold the horse to the plaintiff, who had no knowledge of the lien. *Held,* the defendant lost his lien as against the plaintiff. *Moore* v. *Whitehead* (Oh. 1908) 54 Oh. Law Bull. 456.

Since a lien at common law was essentially a mere right of detention, *Gladstone* v. *Birley* (1817) 2 Mer. 401, it has frequently been stated that any voluntary relinquishment of possession destroys it. *Sweet* v. *Pym* (1800) 1 East 4. In the case of livery keepers, a few jurisdictions have consequently held that permitting the owner to have the possession of the horse is inconsistent with the theory of a lien, and that therefore the lien is lost by such action. *Vinal* v. *Spofford* (1885) 139 Mass. 126; *Cardinal* v. *Edwards* (1869) 5 Nev. 37. The weight of authority, however, is strongly in favor of the view that such permission is based on an implied condition that the owner will return the horse, and consequently as between the parties the lien still exists. *Walls* v. *Long* (1891) 2 Ind. App. 202; *Young* v. *Kimball* (1854) 23 Pa. St. 193. Although a few courts have carried this doctrine to the result of sustaining the validity of the lien as against third parties holding through the owner in possession, *State* v. *Shevlin* (1886) 23 Mo. App. 598; *Welsh* v. *Barnes* (1895) 5 N. D. 277, most courts have been cautious in upholding the lien as against third parties. *Marsailles Mfg. Co.* v. *Morgan* (1881) 12 Neb. 66; cf. *Allan* v. *Spencer* (N. Y. 1845) 1 Edm. Sel. Cas. 117. It is therefore generally held, that when the owner is in possession, the lien is divested by a sale to a *bona fide* purchaser, *Fishell* v. *Morris* (1889) 57 Conn. 547, and also by an attachment by his creditors. *McFarland* v. *Wheeler* (N. Y. 1841) 26 Wend. 467; but see *Caldwell* v. *Tutt* (Tenn. 1882) 10 Lea 258. The principal case is, therefore, in accord with the weight of authority.

LIMITATION OF ACTIONS—MORTGAGE ON REALTY UNAFFECTED BY BARRED DEBT.—A debtor gave promissory notes secured by a mortgage on realty. In an action to foreclose, the six year statute of limitations was pleaded. *Held,* the mortgage lien and notes were barred. *Childs* v. *Smith* (Wash. 1909) 99 Pac. 304.

Where a debt is barred by the statute of limitations, a lien by way

of security is not thereby destroyed, as the statute is regarded as affecting the remedy only, without extinguishing the debt. *Spears* v. *Hartly* (1800) 3 Esp. 81. Equity generally regards a mortgage as a lien on the lands, vesting an interest in the creditor which the unenforcibility of the debt does not destroy, and since the debt itself is not extinguished, the mortgage can be foreclosed if the mortgagee is not guilty of laches. *Mich. Ins. Co.* v. *Brown* (1863) 11 Mich. 265; *Coldclaugh* v. *Johnson Adm.* (1879) 34 Ark. 312. In deciding this latter question, equity generally adopts the statute of limitations applicable to suits for the recovery of realty. *Belknap Adm.* v. *Gleason* (1836) 11 Conn. 160; *Nevitt* v. *Bacon* (1856) 32 Miss. 212. When the mortgage is under seal, however, the statute governing specialties applies. *Hurlburt* v. *Clark* (1891) 128 N. Y. 295. Some courts, however, consider the mortgage as a mere incident to the debt, which vanishes when the debt becomes unenforceable, *Harris* v. *Mills* (1862) 28 Ill. 44; *Duty* v. *Graham* (1854) 12 Tex. 427, unless it contains an express covenant to pay, in which case it is regarded as an independent covenant unaffected by the barring of the debt. *Crawford* v. *Hazelrigg* (1888) 117 Ind. 63; *Harris* v. *Mills, supra.* The principal case is in accord with the cases decided in those jurisdictions where the same statute of limitations covers all legal and equitable actions, simple contracts and specialties. *Lord* v. *Morris* (1861) 18 Cal. 482; *Chick* v. *Willetts* (1864) 2 Kan. 384.

MANDAMUS—UNIVERSITIES—EXPULSION OF MATRICULATED STUDENT.—The relators, who were matriculated students of the defendant institution, at the beginning of the second year were arbitrarily refused admission. *Held,* the obligations of the corporation to them were contractual, and would not be enforced by mandamus. *Booker* v. *Grand Rapids Medical College* (1909) 120 N. W. 589.

Mandamus is not a proper remedy to enforce purely contractual obligations between a private corporation and one of its members. *Mutual Aid Ass'n* v. *Riddle* (1883) 91 Ind. 84. Yet mandamus will lie to reinstate a corporator, *State* v. *Georgia Medical Society* (1869) 38 Ga. 608, or a member, *Weiss* v. *Mus. Prot. Union* (1899) 189 Pa. St. 446, who has been arbitrarily and without cause expelled, or where the expulsion has been the result of a harsh and unreasonable by-law. *Matter of Brown* v. *Order of Foresters* (1903) 176 N. Y. 132. The basis of this relief is not a contractual obligation, but the legal status of the member, which the courts will protect in the exercise of their general visitatorial power over the corporation. High, Ex. Leg. Rem. (3rd ed.) § 294. The position of a matriculated student is not merely that of a contracting party to whom damages are a sufficient recompense, but is more akin to that of a member of a corporation, and consequently mandamus is a proper remedy, when expulsion is due to an unreasonable regulation, *Commonwealth* v. *McCauley* (1886) 2 Pa. Co. Ct. Rep. 459, or an arbitrary exercise of power. *Baltimore University* v. *Colton* (1904) 98 Md. 623; *People* v. *Bellevue Hospital Medical College* (N. Y. 1891) 60 Hun 107; aff'd 128 N. Y. 621. But where dismissal is the result of the application of a proper regulation, the action of the university board is final. *State* v. *Regents of Univ. of Wisconsin* (1882) 54 Wis. 159. One case, however, has regarded the rights of a matriculated student as purely contractual, *State* v. *Milwaukee Medical College* (1906) 128 Wis. 7, and as in the principal case, has refused to grant mandamus to compel reinstatement. This view places an unnecessary restriction upon the functions of the writ.

MINES AND MINING—DAMAGES—INNOCENT TRESPASSERS.—Defendants, innocent trespassers upon the plaintiff's land, sunk wells and pumped off a quantity of oil. *Held,* the measure of damages was the value of the oil as it lay in the ground before the taking. *Turner* v. *Seep* (1909) 167 Fed. 646.

Where oil is wrongfully mined from another's land through inadvertence or mistake, the earlier English decisions refused to regard the enhanced

value at the mouth of the mine as the measure of damage, and held that the lowest possible amount which could be awarded consistently with the nature of an action for the asportation of personal property, was the value when it first became a chattel. *Martin* v. *Porter* (1839) 5 M. & W. 351; 1 COLUMBIA LAW REVIEW 63. Later this doctrine was modified, the measure of damages not being regarded as governed by the nature of the action, but as dependent upon the actual damage inflicted, i. e., the value of the mineral in the ground before severance. *Livingstone* v. *Rawyards Coal Co.* (1880) L. R. 5 App. Cas. 25; *In re United Merthyr etc. Co.* (1872) L. R. 15 Eq. 46. In this country the courts are divided, some following the earlier English rule, *Burton Coal Co.* v. *Cox* (1873) 39 Md. 1, others its later modification. *Coal Creek etc. Co.* v. *Moses* (Tenn. 1885) 15 Lea. 300. The latter doctrine is also applied in some states where trees are innocently taken from the realty, recovery being confined to their value when standing, *Whitney* v. *Huntington* (1887) 37 Minn. 197, although the more usual rule is their value immediately after severance. *White* v. *Yawkey* (1895) 108 Ala. 270. Since in oil-mining the acts of severing and bringing to the surface are practically one operation, an application of the milder rule would seem particularly convenient and just. Cf. *Dyke* v. *The Nat'l Transit Co.* (N. Y. 1897) 22 App. Div. 360; aff'd (1889) 158 N. Y. 705.

MORTGAGES—EXTENSION TO SUBSEQUENT DEBTS.—After the defendant's assignor in bankruptcy had repaid to the plaintiff $450 of a loan of $900, which was secured by a mortgage, he borrowed $450 more and orally agreed with the plaintiff that the mortgage should secure both debts. *Held,* in a suit to foreclose, the plaintiff should get judgment as of a mortgage for $450. *Hayhurst* v. *Morin* (Me. 1908) 71 Atl. 707.

In suits affecting only the rights of the mortgagor and mortgagee and their privies, a mortgage which on its face purports to secure a present debt will be considered security for a later debt; (1) if it be shown by parol evidence that such was the intention of the parties at the time of the delivery of the mortgage; *Shirras* v. *Craig* (U. S. 1812) 7 Cranch 34, 50; (2) generally, if the mortgage has been satisfied and delivered up, and not cancelled, and the mortgagor re-delivers it to cover a fresh loan; *Underhill* v. *Atwater* (1871) 22 N. J. Eq. 16; Jones, Mortgages (6th Ed.) § 362; but see Id. § 947; (3) if, after delivery, the parties, desiring to extend the mortgage to secure a further indebtedness make a formal indorsement on the mortgage to that effect, *Choteau* v. *Thompson* (1853) 2 Oh. St. 114, 132, or, (4) according to the weight of authority, a separate written contract. *McClure* v. *Smith* (1902) 115 Ga. 709; but see *McCaughrin* v. *Williams* (1881) 15 S. C. 505. A mere parol agreement to the same effect, as in the principal case, will not be enforced against the mortgagor; *Hughes* v. *Johnston, Trustee* (1881) 38 Ark. 285; *Lindsay* v. *Garvin* (1889) 31 S. C. 259; but see *Walker* v. *Walker* (1851) 17 S. C. 329; but some courts hold that when in an action in equity the mortgagor is the complainant, as in a suit to redeem or to enjoin foreclosure, he will be compelled to abide by his parol agreement on the ground that he who seeks equity must do equity. *Upton* v. *Nat'l Bank* (1876) 120 Mass. 153; Jones, Mortgages § 357; but see *Stoddard* v. *Hart* (1861) 23 N. Y. 556.

NEGOTIABLE INSTRUMENTS—DEFINITE AMOUNT PROMISED FOR ATTORNEY'S FEES—PENALTY.—The defendant agreed, in a promissory note, to pay ten per cent for attorney's fees in event of default. *Held,* such a promise was a contract of indemnity to pay only actual fees expended or contracted for. *Young* v. *State Bank* (Tex. 1909) 117 S. W. 476.

Whether a stipulation to pay a definite amount as attorney's fees is a promise to pay a penalty, or to pay liquidated damages, is a question of intention, *Elmore* v. *Rugely* (Tex. 1908) 107 S. W. 151, although if unreasonable, however clearly the intention may be expressed, a contract for liquidated damages will not be enforced. *Daly* v. *Maitland* (1879)

88 Pa. St. 384. If a contract fall under the following rules of construction it is regarded as providing for a penalty; (1) generally, where it contains a promise to pay a larger sum in the event of default in payment of a lesser, *Taylor* v. *Sandiford* (1822) 7 Wheat. 13, or (2) where the actual damage is readily ascertainable. *Boozer* v. *Anderson* (1883) 42 Ark. 167. If a penalty, the contract is enforceable only to the extent of indemnifying the promisee by recovery of the actual fees proved. *Elmore* v. *Kugely, supra.* The theory of the cases holding the promise valid on the doctrine of liquidated damages is either that such a promise is a distinct collateral contract for reimbursement, *Wilson Sewing Machine Co.* v. *Moreno* (1879) 6 Sawy. 35, and hence does not fall under test (1), *supra,* or that the damages are so uncertain, *McIntire* v. *Cagely* (1873) 37 Ia. 676, that test (2), *supra,* is inapplicable. Some jurisdictions, however, have gone to the length of refusing to enforce such a promise, on the ground that it is void because opposed to public policy. *Tinsley* v. *Hoskins* (1892) 111 N. C. 340. Inasmuch as in the absence of express proof, or a manifestly unreasonable stipulation, the ground last mentioned is untenable, and since there hardly appears to be a sufficient independent consideration to support a distinct collateral contract, and the fees in point of fact are readily ascertainable, the indemnity theory, in the principal case, is correct.

NEGOTIABLE INSTRUMENTS—DELIVERY TO THE PAYEE'S AGENT IN ESCROW.—The defendants gave three notes to the plaintiff's agent, under an oral agreement that the notes should not go into effect unless the machine in payment for which they were given, should prove satisfactory. Although the machine proved unsatisfactory, the plaintiff brought suit upon the notes. *Held,* the delivery to the agent was a valid escrow, and the plaintiff could not recover. *Case Thresh. Mach. Co.* v. *Barnes* (Ky. 1909) 117 S. W. 418.

By the American rule a deed cannot be delivered to the grantee in escrow, *Lawton* v. *Sager* (N. Y. 1851) 11 Barb. 349; *Dawson* v. *Hall* (1852) 2 Mich. 390, 392, oral evidence being inadmissible to prove the condition. It may, however, be so delivered to the agent of the grantee, if he be constituted the agent of the grantor for that purpose. *Cincinnati W. & Z. R. R. Co.* v. *Iliff* (1862) 13 Oh. St. 235, 249, 253. The grantee, also, may be made the agent of the grantor to forward the deed to its depositary, *Gilbert* v. *N. A. Fire Ins. Co.* (N. Y. 1840) 23 Wend. 43, 46, but such agreement cannot be shown if he fail to deliver the deed and claim to hold it absolutely. See *Braman* v. *Bingham* (1863) 26 N. Y. 483, 491. The English courts show a disposition still further to relax the rule against delivery to a grantee in escrow. *London etc. Co.* v. *Suffield* (1807) 2 Ch. 608, 621; *Watkins* v. *Nash* (1875) L. R. 20 Eq. 262, 267. It is said to be a technical rule of sealed instruments, Wigmore, Evid. § 2408; and does not properly apply to contracts not under seal. *Benton* v. *Martin* (1873) 52 N. Y. 570, 574; *Burke* v. *Dulaney* (1894) 153 U. S. 228, 234. Oral evidence is admitted in such cases, not to vary the terms of a contract, but to show that the writing had never gone into effect as a contract. 3 COLUMBIA LAW REVIEW 61. The result of the principal case is therefore correct, though reached on the mistaken analogy of deeds. Cf. *Massmann* v. *Holscher* (1871) 49 Mo. 87, 89.

NEGOTIABLE INSTRUMENTS—EXTENSION AFTER MATURITY—BONA FIDE HOLDER.—After the maturity of a note, and while it was still in the possession of the payee, an undated notice extending the time of payment was written thereon. Later, the plaintiff, not knowing when the extension was made, became indorsee for value. *Held,* the plaintiff could recover as a *bona fide* holder before maturity. *Conkling* v. *Young* (Ia. 1909) 120 N. W. 353.

In order to facilitate the circulation of commercial paper, a transfer or undated indorsement of a negotiable instrument is *prima facie* regarded as having been made before the instrument is overdue. *Noxon* v. *DeWolf*

(Mass. 1858) 10 Gray 343; *Parkin* v. *Moon* (1836) 7 Carr. & P. 408; Neg. Inst. Law § 98. Similarly, an undated extension of the time of payment written upon the note, is presumed to have been made before maturity. *St. Joe etc. Co.* v. *First Nat'l Bank* (1897) 10 Colo. App. 339. If, however, it is shown that a transfer or indorsement was made after maturity, the transferee is not a purchaser for value without notice, since he is held to have knowledge of what appears upon the instrument, including the date of maturity. *Miller* v. *Crayton* (N. Y. 1874) 3 Thomp. & Cook 360; *Sylvester* v. *Crapo* (Mass. 1833) 15 Pick. 92. But when there is an undated notice of extension, although it is proved that the extension was made after maturity, it is unconscionable for the maker to be freed from liability to an innocent transferee for value who relies upon such representation. *Whitney Nat'l Bank* v. *Cannon* (1900) 52 La. Ann. 1484. This conclusion appears sound, for although the notice of extension is undated, this would scarcely seem sufficient to put the transferee on inquiry, and mere carelessness in acquiring a note does not make a *mala fide* holder. *Hamilton* v. *Vought* (1870) 34 N. J. L. 187. Obviously, where the note bears no notice of an existing agreement to extend, the transferee after maturity is not protected. *Swan* v. *Craig* (1905) 73 Neb. 182. The principal case is in accord with authority, and illustrates the liberal tendency of the courts in fostering the circulation of commercial paper whenever possible. Cf. *Chem. Nat'l Bank* v. *Kellogg* (1905) 183 N. Y. 92.

NUISANCE—PUBLIC NUISANCE—ADMISSIBILITY OF EVIDENCE TO SHOW PUBLIC BENEFIT.—The defendant, a private corporation, was indicted for nuisance because its stack emitted cinders. The lower court refused to admit evidence tending to show that the defendant furnished electric power exclusively to the Brooklyn street railways, and that the public benefits outweighed the disadvantages. *Held*, such evidence should have been admitted. *People* v. *Transit Development Co.* (1909) 115 N. Y. Supp. 297.

Where a public nuisance clearly exists, the text writers lay down the rule that collateral benefit to the community is no defence to an indictment. 2 Wharton, Crim. Law, § 1416; Wood, Nuisance (2 Ed.) 31. In England, *Rex* v. *Russell* (1827) 6 B. & C. 566, held squarely, Lord Tenterden dissenting, that counter-balancing public benefit was a material defence; but this case has been discredited. *Rex* v. *Ward* (1836) 4 Ad. & E. 384; *Reg.* v. *Betts* (1850) 71 E. C. L. R. 1022. The rule of these latter cases had previously been applied in the United States, *Respublica* v. *Caldwell* (Pa. 1785) 1 Dall. 150, and has been expressly followed since. *Seacord* v. *People* (1887) 121 Ill. 623, 636. In a private action, where a nuisance admittedly exists, injunctive relief may be denied because of public benefit. *Bliss* v. *Anaconda Copper Mining Co.* (1909) 167 Fed. 342. In New York it has been intimated that, where the inconvenience is slight, evidence of public benefit may be admitted to determine whether in fact a public nuisance exists. *People* v. *Horton* (1876) 64 N. Y. 610. The same considerations of public benefit that cause equity to deny injunctive relief in private actions, no doubt influenced the court in the principal case to depart from the established legal rule, and return to the old rule of *Rex* v. *Russell, supra*, a result justifiable, perhaps, under the peculiar circumstances of the case.

NUISANCE—TEST OF PERMANENCE.—The defendant company obstructed an abutter's easement of access by building an embankment for its tracks, and kept the street out of repair in violation of its statutory duty. *Held*, that but one recovery could be had for the embankment, since it was permanent, but that since the bad grading was abatable, it was ground for repeated actions, which were not barred by the statute of limitations. *Stein* v. *C. & O. Ry. Co.* (Ky. 1909) 116 S. W. 733. See Notes, p. 538.

OFFICERS—RIGHT OF OFFICER WRONGLY REMOVED TO RECOVER SALARY—DEFENSES.—The plaintiff, wrongly removed from his position, after rein-

statement, sued the city for salary for the period of removal. *Held*, he might recover the full amount without deduction for money earned in other employment during his exclusion. *Sutliffe* v. *City of New York* (1908) 115 N. Y. Supp. 186.

This decision is sound, and is well supported by authority. The right to the salary of an office is an incident of the office. Not depending on contract, like a mere employment, the principle of dimunition of damages in master and servant contracts does not apply. *Fitzsimmons* v. *Brooklyn* (1886) 102 N. Y. 536. But this right to the salary after removal may be lost by acts indicating an intention to abandon the office. *Wardlaw* v. *The Mayor* (1893) 137 N. Y. 194; see also *Gregory* v. *The Mayor* (1889) 113 N. Y. 416, 422. Also the removed officer cannot sue for salary until he shall have established his title to the office in a direct proceeding. *Lee* v. *The Mayor etc.* (Del. 1894) 1 Marv. 65. Since a *de facto* officer has no title, actual incumbency gives him no right against the city for the compensation. *People* v. *Tieman* (N. Y. 1859) 30 Barb. 193; *Erwin* v. *The Mayor* (1897) 60 N. J. L. 141, *contra*. However, payment to a *de facto* officer,—e. g. one appointed under color of right to fill the office from which the *de jure* officer has been removed,—is a defense to the removed officer's suit against the city for salary. *Dolan* v. *The Mayor* (1877) 68 N. Y. 274; *Memphis* v. *Woodward* (Tenn. 1873) 12 Heisk. 499, *contra*. The excluded officer's remedy is an action against the *de facto* officer for the compensation received. *Dolan* v. *The Mayor, supra; Glascock* v. *Lyons* (1863) 20 Ind. 1. But this defense is not available to the city when it has paid a mere intruder, *Warden* v. *Bayfield County* (1894) 87 Wis. 181, or a person who has been judicially determined not to be the *de jure* officer. *Scott* v. *Crump* (1895) 106 Mich. 288; *McVeany* v. *The Mayor* (1880) 80 N. Y. 185.

PATENTS—AGREEMENTS IN RESTRAINT OF TRADE—APPLICATION OF ANTI-TRUST STATUTES.—Plaintiff and defendant and another, owning separate and competing patents, entered into mutual agreements to pool profits, restrict output, and otherwise to eliminate competition. *Held*, such agreements were void and unenforceable under the Sherman Anti-Trust Act. *Blount Mfg. Co.* v. *Y. & T. Co.* (1909) 166 Fed. 555. See Notes, p. 536.

PLEADING AND PRACTICE—COMPULSORY REFERENCE—COUNTERCLAIM.—The plaintiff sued the defendants, his stockbrokers, for damages resulting from their selling him out without authority. Defendants entered a denial, and also a counterclaim involving a long account. *Held*, the action was not referable under § 1013 of the Code. *Barber* v. *Ellingwood* (1909) 115 N. Y. Supp. 43.

Since the New York Constitution of 1777 retained inviolate the right of trial by jury in all cases in which it had theretofore been used, compulsory reference under § 1013 is only constitutional in those cases in which prior to 1777 there was not the absolute right to such trial. 7 COLUMBIA LAW REVIEW 291. In applying this principle, it has been held that since before that time a defendant could not both deny and counterclaim, today such an action was not referable *in its entirety* without consent. *Steck* v. *Colorado F. & I. Co.* (1894) 142 N. Y. 236. In construing this section the courts have frequently stated that the complaint alone is the test of whether the action is referable, *Welsh* v. *Darragh* (1873) 52 N. Y. 590, but this is not strictly correct. *Irving* v. *Irving* (N. Y. 1895) 90 Hun 422. In reliance on the broad rule as stated, however, several cases have held that when the complaint is referable as involving a long account, the entire action may be referred, irrespective of the counterclaim interposed, *B. & R. B. Ry.* v. *Reid* (N. Y. 1880) 21 Hun 273, but the better view today is that under such circumstances, although the main issue may be referred, the defendant is entitled to a jury trial of the counterclaim, as granted in § 974. *Deeves* v. *Metropolitan Co.* (N. Y. 1893) 6 Misc. 91; aff'd 141 N. Y. 587; *Hoffman House* v. *Hoffman House Cafe* (N. Y. 1899) 36 App. Div. 176; but see *Claffy* v. *Madison Ave. Co.* (N. Y.

1908) 124 App. Div. 774. If this view is sound, the converse would appear to follow—that though the complaint itself is not referable, the counterclaim, if involving a long account, should come within the purview of § 1013. *Untermeyer* v. *Beinhauer* (1887) 105 N. Y. 521. While the principal case is, therefore, correct in not referring the entire action, it would seem that on proper motion the counterclaim itself could have been referred.

PUBLIC LANDS—TITLE UNDER FORMER SOVEREIGNTY.—The plaintiff and his ancestors, Philippino tribesmen, had occupied land as owners, according to the tribal custom, for at least fifty years. His title could be held legal under Spanish rule by a liberal construction of Spanish statutes. *Held,* the plaintiff is entitled to register the land as his own under the United States government. *Carino* v. *The Insular Government of the P. I.* (1909) 29 Sup. Ct. Rep. 334.

Since a conquering nation acquires only the sovereignty over, not private property in, the land acquired, it is well settled that titles good under the former sovereign will be protected by the United States, *U. S.* v. *Percheman* (U. S. 1833) 7 Pet. 51, even when they have been acquired under statutes which in the United States would be unconstitutional, *League* v. *De Young* (U. S. 1850) 11 How. 185, or when, being merely inchoate, the former sovereigns would have been under a conscientious obligation to complete them. *Hall* v. *Doe* (1851) 19 Ala. 378, 386; cf. *Doe* v. *Jones* (1847) 11 Ala. 63, 80. Although it has been said that judicial recognition of this principle as a rule of international law would alone be sufficient to safeguard such title, *U. S.* v. *Percheman, supra,* at 86, binding provisions for this purpose are generally inserted in the treaties by which the United States acquires the territory, *U. S.* v. *Moreno* (U. S. 1863) 1 Wall. 400, and courts or commissions generally appointed for registration purposes, as in the principal case. *Astiazaran* v. *Santa Rita Co.* (1892) 148 U. S. 80. After the acquired territory is admitted as a state, federal jurisdiction of such titles ceases, but the state courts apply the same principles. *City of New Orleans* v. *Armas et al* (U. S. 1835) 9 Pet. 224, 236. The readiness of the court in the principal case to establish the valadity of the plaintiff's title as against that of the United States, seems to be based in great measure upon the avowed policy of the government to administer the Islands in the interests of the natives. Act of July 1, 1902, Chap. 1369, § 12 (32 Stat. at L. 691).

PUBLIC SERVICE COMPANIES—DURATION OF CONTRACT FOR INTERCHANGE OF SERVICE.—The owners of two telephone systems established a common switchboard with an agreement for the interchange of service, under a contract whose duration was not specified. *Semble,* specific performance could be properly decreed; the contract, being affected with a public interest, could not be terminated so long as both parties continued to operate their plants. *State ex rel. Goodwine* v. *Cadwallader* (Ind. 1909) 87 N. E. 644.

The court's interpretation of the intention of the parties from the nature of the contract,—that it should not be terminable at the will of either party,—seems correct. See *Campbellsville Tel. Co.* v. *Lebanon etc. Co.* (1904) 118 Ky. 284, 287. The contract would appear to be specifically enforceable in equity, despite the continuous supervision involved. 8 COLUMBIA LAW REVIEW 670. The parties could not have been compelled to make such a contract, *Atchinson etc. R. R. Co.* v. *Denver etc. R. R. Co.* (1884) 110 U. S. 667, 680; but the court considered that, having made the connection, they were bound, because of the public interest, to continue it. The relator would not be excused from the performance of the duties of his public calling by pleading the terms of a contract which attempted to limit such performance. *Commercial Union etc. Co.* v. *New England etc. Co.* (1888) 61 Vt. 241, 250. The courts are not agreed whether a partial discontinuance of public service should be allowed. Where it is allowed, *Commonwealth* v. *Fitchburg R. R. Co.* (Mass. 1858) 12 Gray

180, the language of the court in the principal case would seem too broad. Even where it is denied, *State* v. *Hartford & N. H. R. R. Co.* (1861) 29 Conn. 538, 547, termination of the contract should be allowed, it is submitted, if equal service be offered in some other way, since the court's only ground is the public interest. The cases cited by the court are distinguishable, *Campbellsville Tel. Co.* v. *Lebanon etc. Co., supra,* arising under a constitutional requirement for such a connection, and *Mahan* v. *Mich. Tel. Co.* (1903) 132 Mich. 242, depending upon the terms of a franchise.

REAL PROPERTY—DEVISABILITY OF CONTINGENT REMAINDERS AND EXECUTORY DEVISES.—A devised real property to B for life, remainder to B's children; and if no children, then one-third to C. C died during the life time of B, having devised all his property. *Held,* that C's contingent interest was devisable. *Fisher* v. *Wagner* (Md. 1909) 71 Atl. 999. See Notes p. 546.

TAXATION—TRADE-MARKS—STATUS AS TAXABLE PROPERTY.—The plaintiff sued to compel the defendant to list as taxable property several trade-marks of value used by the defendant. The state constitution provided that "all property shall be taxed in proportion to its value, unless exempted by this constitution." *Held,* the trade-marks were not property within the contemplation of the constitutional section. *Commonwealth* v. *Kentucky Distilleries etc. Co.* (Ky. 1909) 116 S. W. 766.

A trade-mark, although it cannot be sold or assigned apart from the business to which it is attached, *MacMahon* v. *Denver* (1901) 113 Fed. 468, is today generally recognized as property, and entitled to protection as such. *Derringer* v. *Plate* (1865) 29 Cal. 293; *Avery & Sons* v. *Meikle* (1883) 81 Ky. 73. The question in the principal case, however, is whether it is such property as was contemplated in the constitutional provision quoted. Such provisions are designed to secure equality in taxation, *People* v. *Worthington* (1859) 21 Ill. 170, and the courts have generally held that they do not require the taxation of every form of property right. *Board of County Com'rs etc.* v. *Rocky Mountain etc. Co.* (1900) 15 Colo. App. 189; *State* v. *Savage* (1902) 65 Neb. 714 at 742. When extraordinary forms of property are sought to be taxed, there is substantial unanimity that such property must be specially designated, *People* v. *Feitner* (1901) 167 N. Y. 1 (stock exchange seat); *Willis* v. *Commonwealth* (1899) 97 Va. 667 (ground rents), and a method of assessment devised. *State Board* v. *Holliday* (1897) 150 Ind. 216. Thus while good will, the legal characteristics of which are closely akin to those of trade-marks, has been held not taxable *per se* under a state constitutional provision, *Hart* v. *Smith* (1902) 159 Ind. 182, it is taxable when so designated as part of a corporation's capital. *People* v. *Dederick* (1900) 161 N. Y. 195 at 210. The principal case correctly holds, therefore, that the trade-marks are not necessarily taxable as "property" under the constitutional provision, but they would be taxable if a statute taxed the business as a unit. See *Adams Express Co.* v. *Ohio* (1897) 166 U. S. 185 at 217.

VENDOR AND PURCHASER—RECOVERY FOR IMPROVEMENTS MADE UNDER UNENFORCEABLE CONTRACT TO CONVEY REALTY.—The plaintiff sued to recover money paid on account of the price under a parol contract for the purchase of land, and for compensation for the improvements made, the defendant being unable to give title. *Held,* the plaintiff should recover the money paid and the amount by which the improvements enhanced the land. *Ford* v. *Stroud* (N. C. 1909) 64 S. E. 1.

In many jurisdictions, the vendee by parol, who has taken possession of the land with the vendor's consent and made improvements, is entitled to specific performance, on the ground that the contract has been taken out of the statute of frauds by part performance. *Morrison* v. *Herrick* (1889) 130 Ill. 631, 640, 643. Even where such is not the rule, courts of equity allow the vendee compensation for the enhancement by the improvements, less the value of the use of the land. *Yates* v. *Bachley* (1873) 33 Wis. 185, 188. Such recovery, however, is refused at law on the ground

of inability to award proper damages, *Shreve* v. *Grimes* (Ky. 1823) 4 Litt. 221, 225, but this objection has been criticized as inadequate. Keener, Quasi Contracts, 369, 371. Recovery of money paid as part of the purchase price is uniformly allowed. *Gillet* v. *Maynard* (N. Y. 1809) 5 Johns. 85. Under the reformed procedure, the right to compensation for improvements is a good equitable counterclaim to an ejectment action. *Daniel* v. *Crumpler* (1876) 75 N. C. 136. The principal case follows the equitable rule in allowing a recovery for improvements under the reformed procedure, and is in accord with *Luton* v. *Badham* (1900) 127 N. C. 96, 100, in repudiating the rule of *Dunn* v. *Moore* (N. C. 1844) 3 Ired. Eq. 364, 368, that a parol contract, when denied by the defendant's answer, is not provable for the purposes of an equitable accounting for improvements.

WATERS AND WATERCOURSES—PERCOLATING WATERS—REASONABLE USER OF MINERAL WATERS.—The defendant pumped mineral waters from the spring on his land at Saratoga Springs, extracted the carbonic gas, and sold the product. The plaintiff, a neighboring land owner, also marketing the water, sued for damages, because of the decreased flow of his spring. *Held*, the plaintiff was entitled to recover. *Hathorn* v. *Natural Carbonic Gas Co.* (N. Y. 1909) 87 N. E. 504. See Notes, p. 543.

WILLS—IMPLIED REVOCATION BY MARRIAGE.—The testator made a will, married, and died without issue. *Held*, the will was not revoked by the marriage. *Hoy* v. *Hoy* (Miss. 1909) 48 So. 903.

At common law subsequent marriage and the birth of issue operated to revoke a man's will; the court reading into it a condition, implied in law, to that effect. *Marston* v. *Roe* (1838) 8 Ad. & El. 14; but see *Brush* v. *Wilkins* (N. Y. 1820) 4 Johns. Ch. 506. In determining the effect of the changed status of the wife, giving her the right to inherit, it has been held that the reason underlying the revocation was the testator's implied intention not to see his heirs disinherited, and consequently the wife now being an heir, marriage alone works a revocation. *Brown* v. *Scherrer* (1894) 5 Colo. App. 255. Under this view, issue would revoke a will made after marriage, but this is not the result at common law, and the Colorado case would seem to lose sight of the fact that while the revocation rests ultimately on intention, that intention may not be presumed in the absence of sufficient change of circumstances. *Doe* v. *Barford* (1815) 4 M. & Sel. 10. Another line of cases imputes to the testator the intention not to see his family go unprovided for. *Hoitt* v. *Hoitt* (1885) 63 N. H. 475. Where, therefore, as in the principal case, ample statutory provision is made for the wife, no revocation will be implied. *Hulett* v. *Carey* (1896) 66 Minn. 327. Where, on the other hand, the wife is not so provided for, the cases, holding marriage alone sufficient to work a revocation, *Tyler* v. *Tyler* (1857) 19 Ill. 151, although open to the same objection as *Brown* v. *Scherrer, supra,* may be justified on grounds of public policy.